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No. ____

IN THE

Supreme Court of the United States

SHIRLIE D. GREEN,
Petitioner,

v.

JACQUELYN H. BARRETT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals Improperly Expanded this Court's Holding in *Garcetti v. Ceballos*, -- U.S. --, 126 S.Ct. 1951, 164 L. Ed. 2d 689 (2006), by Holding That a Public Employee's In-court Testimony Is Not Protected under the First Amendment?

II. Whether the Court of Appeals Improperly Expanded *Garcetti* by Holding That a Public Employee's Testimony Is Not Protected under the First Amendment Where the Speech Is Not Performed *Pursuant to* Her Official Duties, but Merely Is Based on Facts the Employee Learned *Because of* her Employment?

LIST OF PARTIES

All parties to the proceeding are below:

Jacquelyn H. Barrett
Shirlie D. Green

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The opinion of the Court of Appeals denying Petitioner's application for Rehearing and Rehearing En Banc is reproduced at Appendix ("Pet. App.") A, 1a. The opinion of the Court of Appeals reversing the district court is reproduced at Pet. App. B, 3a. The district court's order decisions denying Respondent's motion for summary judgment following supplemental briefing regarding *Garcetti* is reproduced at Pet. App. C, 11a. The district court's initial order denying Respondent's motion for summary judgment is reproduced at Pet. App. D, 17a.

STATEMENT OF JURISDICTION

On September 19, 2006, Respondent filed an interlocutory appeal to the Eleventh Circuit Court of Appeals of the district court's denial of her qualified immunity defense. The Court of Appeals reversed the district court on March 14, 2007, directing that judgment be entered for Respondent. The Court of Appeals denied Petitioner's Application for Rehearing and Rehearing En Banc on May 17, 2007. Petitioner invokes the jurisdiction of this Court under 28 U.S.C.§ 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS

The text of First Amendment to the United States Constitution and 42 U.S.C. § 1983 are set out in Appendices E and F, respectively.

STATEMENT OF THE CASE

The Fulton County Sheriff's Department ["Sheriff"] employed Petitioner Shirlie D. Green ["Green"] for nineteen (19) years, most recently as its chief jailer in charge of the Fulton County Jail. While the chief jailer was tasked with many administrative duties, testifying in court was not one of them. (DC112 - 1, Ex. A).[1]

On the evening of March 19, 2003, an inmate named Jamil Abdullah Al-Amin ["Al-Amin"] was involved in an attempted escape at the Fulton County Jail. (Pet. App. 4a, 18a). Al-Amin was serving a life sentence for murdering a Fulton County deputy sheriff. (*Id*). During the attempted escape, deputies observed Al-Amin on jail security cameras walking freely around the cell block. (*Id*). After Al-Amin's escape attempt, a Fulton County Assistant District Attorney ["ADA"] contacted Green and requested that she testify at an emergency hearing to have Al-Amin transferred to the State maximum security prison. (DC53 - 106-107).

On March 26, 2003, Green testified in the Superior Court of Fulton County regarding whether Al-Amin could be safely housed at the Fulton County Jail. (Pet. App. 4a). Green disclosed that many of the cell doors and locks in the high security zone were broken or easily jammed. (*Id*). She testified that Al-Amin and other dangerous inmates freely moved outside of their cells within the high security zone. (*Id*). Then,

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[1]References to "DC" refer to the docket entries in the district court.

on cross examination, she conceded that these conditions made the jail "unsafe." (*Id*).

Many other jail employees possessed the same information about the lack of jail security. (Pet. App. 28a). It was "common knowledge" among the deputies and the inmates that there were serious problems with the cell door locks. (DC102 - 82).

None of Green's written "duties and responsibilities" referenced the obligation to provide testimony or otherwise report security issues to the courts. (DC112 - 1, Ex. A).[2]

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[2]The following were Green's official duties as the chief jailer: (A) Assumes administrative responsibility for the Jail Bureau; (B) Defines areas of responsibilities for the Jail Bureau staff; (C) Coordinates projects with Jail Bureau Commanders to develop programs to be implemented; (D) Holds regularly schedule command staff meetings to discuss additions to or modifications of existing programs, policies, and procedures; (E) Implements new policies and procedures affecting the Jail Bureau as a result of new legislation or administrative procedures; (F) Ensures that departmental policies and procedures comply with existing State and Federal mandates and Sheriff's Department Standard Operating Procedures; (G) Maintains control over Jail Bureau expenditures; (H) Directs research into inmate population growth projections and plans jail system expansion accordingly; (I) Submits recommendations to the Sheriff for needed changes or improvements in policies and procedures; (J) Attends Sheriff briefings; (K) Attends Sheriff's Command Staff meetings; (L) Makes recommendations to the Sheriff and/or Chief regarding disciplinary matters; and (M) Represents the Sheriff's [sic] at meetings and on various boards and committees, as directed by the Sheriff.

Green testified before the district court that "[t]estifying in court was not a part of my official job duties or included in my job description." (DC12 - 1 - ¶3). Prior to her testimony in the hearing at issue, she "had never been requested or subpoenaed to testify at any judicial proceedings as a part of [her] position as Chief Jailer." (DC12 - 1 - ¶3). Indeed, the Sheriff did not direct Green to testify and was not aware that Green was going to testify until the ADA notified her. (DC53 - 107).

The Sheriff, alarmed by Green's testimony that the jail was "unsafe," took the stand herself and contested Green's revelations. (DC85, Ex. B, pp. 82-84). Noting this factual dispute between the Sheriff and Green, the criminal trial judge concluded, "I find Chief Jailer Green's testimony that two-thirds of the locks in the protective custody area were inoperable ... to be credible testimony. And I believe it creates a security risk." (DC85, Ex. B, pp. 147-148). The court ordered Al-Amin into state custody. (*Id.*)

Extensive media coverage of Green's testimony caused the Sheriff to terminate Green. The Sheriff admitted to the media that she fired Green because of her testimony. (Pet. App. 20a, 30a). The Sheriff admitted that the only source of information she considered in deciding to terminate Green was the content of an article published in the Atlanta Journal-Constitution, which reported on Green's testimony that the jail was "unsafe." When Green asked why she was terminated, the Sheriff explained, "[b]ecause of your testimony, I have to let you go." (Pet. App. 5a, 20a).

During her deposition testimony, the Sheriff admitted that she was familiar with the First Amendment, and that Green's

in-court testimony regarding the lack of security of the jail was a matter of public concern. Incredibly, Barrett acknowledged that, if she terminated Green because of her in-court testimony, "it would be against the law." (Pet. App. 29a).

After the close of discovery, the Sheriff filed a motion for summary judgment, raising Eleventh Amendment, qualified, and official immunities as grounds for dismissal of Green's claims. On July 28, 2005, the district court denied the Sheriff's motion, finding that "the law was clearly established that plaintiff's in-court testimony was a form of protected speech." (Pet. App. 31a) (citing *Martinez v. City of Opa-Locka, Florida*, 971 F.2d 708 (11th Cir. 1992); *Johnson v. Harris County Flood Control District*, 869 F.2d 1565 (5th Cir.), *cert denied*, 493 U.S. 1019 (1990); and *Green v. Philadelphia Housing Authority*, 105 F.3d 882 (3d Cir. 1997)).

In response to this Court's decision in *Garcetti*, the district court asked the parties to submit arguments regarding its impact on Plaintiff's First Amendment claim. (Pet. App. 14a).[3] After briefing, the district court affirmed its prior order on September 6, 2006, and found that *Garcetti* did not control the instant case because its holding did not extend to in-court testimony. (Pet. App. 15a). The district court reiterated its prior conclusion that in-court testimony is a form of protected under the First Amendment. (Pet. App. 15a-16a, 26a, 28a-29a). On September 19, 2006, Respondent appealed, and the Eleventh Circuit reversed.

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[3]The Court of Appeals incorrectly states that Respondent raised this issue. (Pet. App. 5a).

REASONS FOR GRANTING CERTIORARI

The fundamental right of citizens to offer truthful, sworn testimony during the course of judicial proceedings depends upon the Court's granting of certiorari in this case. This joint freedom and obligation of every citizen is a cornerstone of our democracy. The Eleventh Circuit's misapplication of this Court's decision in *Garcetti* imperils the continued right of public employees to offer sworn testimony against government waste, abuse, and inefficiency. According to the court's ruling below, unlike every other citizen in this country, public employees, like Green, who offer truthful sworn testimony in court, the subject-matter of which coincidentally involves facts they learned during the course of their public employment, are subject to retribution from government employers who object to the content of their testimony.

In the case *sub judice,* it is beyond debate that the content, form, and context of Green's testimony constituted a matter of public concern under this Court's precedents. In a highly publicized criminal trial, a notorious former fugitive was convicted on March 9, 2002 of murdering a Fulton County sheriff's deputy.

After an attempted escape, the district attorney sought to transfer the dangerous inmate from the county jail to the Georgia's maximum security prison. In cooperation with the district attorney, Green testified during another highly publicized criminal proceeding that the cell locks and doors were broken and that the jail was "unsafe." Due largely to Green's testimony that the jail was unsafe to house dangerous criminals, the superior court ordered the infamous Al-Amin

transferred to the higher security state prison. The superior court judge concluded, "I find Chief Jailer Green's testimony that two-thirds of the locks in the protective custody area were inoperable ... to be credible testimony. And I believe it creates a security risk."

In ruling on the Sheriff's summary judgment motion, the district court found that "viewing the evidence in the light most favorable to plaintiff," she "satisfied all four prongs of the *Pickering*[4] test." (Pet. App. 20). The court found that Green's speech addressed a matter of public concern because it focused on the lack of safety in housing high-risk inmates at the Fulton County Jail, was offered in the form of sworn testimony in court, and was offered for the purpose of aiding the superior court's investigation of jail safety related to the housing of a convicted murderer. (Pet. App. 28a). Ultimately, the district court found "overwhelming" evidence "that plaintiff's speech played a substantial role in defendant's decision to fire her." (Pet. App. 30a).

Eleventh Circuit reversed because the subject matter of Green's testimony related to her official duties as chief jailer. In other words, the Sheriff had a legitimate interest as Green's employer in controlling her testimony.

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This petition provides an opportunity for the Court to address two important issues raised by the Eleventh Circuit's application of *Garcetti*: First, whether public employees'

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[4] *Pickering v. Board of Ed. of Township High School District, 205 Will City*, 391 U.S. 563 (1968).

testimonial speech is protected under the First Amendment? Second, what is the standard for federal courts to apply when determining whether public employees speak "pursuant to their official duties"?

I. In-Court Testimony Is Protected Speech Under the First Amendment

A. Testimony is a unique form of speech.

Maintaining the integrity of the judicial process through the protection of testimonial speech enjoys a long history. The availability of truthful testimony is indispensable to the judicial and legislative branches of government. Most obviously, Congress has codified the common law, criminalizing false testimony given under oath. *See* 18 U.S.C. § 1621. States, including Georgia, also recognize the sanctity of truthful testimony by criminalizing perjury. *See, e.g.*, O.C.G.A § 16-10-70.

The Supreme Court has safeguarded testimonial speech outside of the First Amendment context. The Court has held up the self-evident imperative that the integrity of the judicial process demands that in-court testimony be free from interference. In *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court held that witnesses who testify in court are immune from civil suits under 42 U.S.C. § 1983. Elaborating on the rationale supporting witness immunity from civil liability, this Court warned,

> [a] witness's apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses

> might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability.

Id. at 333 (internal citations omitted). The threat of adverse consequences for testifying must be avoided so that "the paths which lead to the ascertainment of truth [may] be left as free and unobstructed as possible." *Id.* at 332 (citing *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)).

The need for protecting public employees who testify against government mismanagement and wrongdoing is no less compelling. The same rationale underlying the recognition of immunity in *Briscoe* applies to public employees who testify: "A witness who knows that he might be [subjected to an adverse employment action] ... might be inclined to shade his testimony in favor of [his employer], to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence." *Id.* at 333.

The potential for witness intimidation by employers is not imagined. This Court acknowledged an employer's undue influence over its employees in *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), where the Court described the risk as follows:

> The danger of witness intimidation is particularly acute with respect to current employees-whether rank and file, supervisory, or managerial-over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted,

> wage and salary increases held up, and other more subtle forms of influence exerted.

Id. at 240; *see also, U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 231 (1940)(observing the reluctance of company employees to testify against their employer in a criminal case). In *Garcetti*, the Court observed that holding government employers liable for regulating an employee's speech made pursuant to his official duties "would be to demand permanent judicial intervention in the conduct of government operation to a degree inconsistent with sound principles of federalism and the separation of powers." 126 S.Ct. at 1961. However, the application of this same reasoning to in-court testimony encourages the opposite and equally unacceptable intrusion of executive influence over the truth-seeking function of the judiciary.

Given these principles, it is not surprising that federal courts have sought to ensure that public employees' testimonial speech is protected under the First Amendment. In *Perry v. Sindermann*, 408 U.S. 493 (1972), a college professor claimed that the state Board of Regents refused to extend his employment contract in retaliation for protected free speech. The speech at issue in *Perry* was testimony before legislative committees and other public statements critical of the Regents. *Id.* at 598. While the claim ultimately failed, this Court had no difficulty reaching its threshold determination: "[p]lainly, these allegations present a bona fide constitutional claim." *Id.* Admittedly, this Court's jurisprudence in the first amendment context has evolved since 1972. But, the Court's fundamental finding that a public employee's testimonial and public criticism of his government constituted protected speech

remains a vital part of the Court's First Amendment jurisprudence. So long as public employees' expressions are those of citizens and not merely those of employees performing their official duties on their employer's behalf, their speech remain protected by the Constitution. As this Court has repeatedly emphasized, "public employees do not surrender all their First Amendment rights by reason of their employment .... the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti*, 126 U.S. at 1957.

There is no exercise more basic to citizenship in our republic than the shared obligation of every citizen to testify truthfully when placed under oath in the course of a legitimate judicial proceeding. *See Ullmann v. U.S.*, 350 U.S. 422, 439 n.15 (1956) (noting that "it is every man's duty to give testimony before a duly constituted tribunal"). That fundamental exercise in democracy is fulfilled only when the witness is free from the fear of retaliation. Moreover, the obligation to testify truthfully inheres to public and private employees alike, *as citizens*, not as employees. As the basis of its holding in *Pickering*, this Court found that public employees' interest in writing letters expressing their concerns over the expenditure of public funds is the same interest held by every citizen in our democracy, regardless of where they work. *Garcetti*, 126 S.Ct. at 1960. This is not a case like *Garcetti* where "there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 1961. Citizens' interest in testifying truthfully before judicial bodies is not dependent on their employment.

B. The court below departed from near unanimity among circuit courts in finding that Green's testimony concerning jail safety was not protected under the First Amendment.

All circuit courts recognize the inherent public concern in testimonial speech to varying degrees. The only disagreement among the circuits is whether greater weight is placed on "context" or "content" of the speech. Several circuits recognize broad protection of testimony under the First Amendment because of its "context," including protection of the filing of a lawsuit and being identified as a witness. Other circuits take a more balanced approach, weighing the context and the content evenly. Still others place more emphasis on the "content" even where the context involves in-court testimony. Nonetheless, all circuits have protected public employees' in-court testimony where, like here, the "content" of the testimony is a matter of public concern. The decision below stands in stark contrast to the widely accepted view that testimonial speech relating to a matter of public concern is clearly protected under the First Amendment.

The Fifth Circuit has issued two frequently cited cases regarding the protection of testimonial speech: *Reeves v. Claiborne County Board of Education*, 828 F.2d 1096 (5th Cir. 1987); and *Johnson, supra, p.* 5.[5] In *Reeves*, a school administrator brought a lawsuit against the school board for

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[5]The district court below expressly relied on *Johnson* in finding that Green's in-court testimony protected speech under clearly established law. (Pet. App. 31a).

violating her First Amendment rights when it transferred her after she testified during a lawsuit. Several employees, not including Reeves, filed a federal lawsuit against the school board alleging that they had been terminated for engaging in political activities in violation of the First Amendment. 838 F.2d at 1098. Ms. Reeves was subpoenaed and testified on behalf of the plaintiffs. Shortly after her testimony, Reeves was transferred to a new position and had many of her supervisory responsibilities taken away. Reeves subsequently filed a lawsuit under the First Amendment claiming retaliation for her testimonial speech. *Id.* at 1099. The court concluded that "Reeves's testimony concerning the operation of the public schools constitutes a matter of 'public concern' as required by *Konits*[6] and *Pickering* and that such expressions are protected by the First Amendment." *Id.* at 1100. The court elaborated on the principles necessitating protection:

> An individual's fear of official retribution could inhibit the willingness of the witness to testify truthfully. Not only would the first amendment right of the witness be infringed by this type of coercion, the judicial interest in attempting to resolve disputes by arriving at the truth would be in jeopardy. Furthermore, a witness who succumbed to any real or imagined coercion could also be subject to a charge of perjury. Of course, it is the duty of every person to testify truthfully before a duly constituted tribunal.

Id. (citing *Ullmann*, 350 U.S. at 439 n.15).

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[6]*Konits v. Valley Stream Central High School District*, 394 F.3d 121 (2d Cir. 2005).

The court continued, "to allow a government employer to retaliate . . . against an employee's unfavorable trial testimony would undermine the ability of the witness to speak truthfully without fear of reprisal. Our judicial system is designed to resolve disputes, to right wrongs. We encourage uninhibited testimony, under penalty of perjury, in an attempt to arrive at the truth." *Id.* at 1100-1101.

In *Johnson*, the Fifth Circuit confirmed its holding in *Reeves*. There, the plaintiff testified on behalf of another employee of the Flood Control District at an equal opportunity hearing. *Johnson*, 869 F.2d at 1568. The District terminated the plaintiff because of his testimony. *Id.* In response to Johnson's First Amendment claim, the District argued that his speech was not protected because it was "an intra government concern involving only one employee." *Id.* at 1577. Rejecting this argument, the district court found that Johnson's speech was protected not only because of its content, but also due to the context, that is, testimony before a fact-finding body. *Id.* at 1576. The Court of Appeals agreed and affirmed the district court's decision.

In support of its holding, the Fifth Circuit observed that "[u]nder certain circumstances . . . the *context* in which the employee speaks may be sufficient to elevate the speech to the level of public concern." *Id.* at 1577 (citing *Konits*) (*emphasis added*). For example, "when an employee testifies before an official government judicatory or fact-finding body, he speaks in a context that is inherently of public concern." *Id.* at 1578 (citing *Reeves*). In a passage from *Johnson* that speaks directly to the present dispute, the Fifth Circuit warned:

> We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state. If employers were free to retaliate against employees who provided truthful, but damaging, testimony about their employers, they would force the employee to make a difficult choice. Employees could either testify truthfully and lose their job or could lie to the tribunal and protect their job security. Those able to risk job security would suffer the state sponsored retaliation when speaking the truth before a body entrusted with the task of discovering the truth.

Id. at 1578. The Court concluded, "the goal of grand jury proceedings, criminal trials, and of civil trials is to resolve a dispute by gathering the fact and arriving at the truth, a goal sufficiently important to render testimony given in the context speech 'of public concern.'" *Id.*

The Third Circuit extended the Fifth Circuit's protection to *potential* testimony in *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996). In *Pro*, the plaintiff worked as a clerk of the Orphans Court in Philadelphia County who was subpoenaed to testify about an alleged extramarital affair in a divorce action against her supervisor. *Id.* at 1285. After Pro appeared as a witness but did not testify, Pro's supervisor terminated her. *Id.* The court embraced the following findings of the district court,

> The real issue after *Johnson* and *Reeves* is control. In the context of the work place, a public employee can normally choose to speak, or not to speak, on the issues that may incur the wrath of his superiors. A subpoenaed witness has no choice but to appear at trial, unless he is willing to risk

> a finding of contempt. Nor does the subpoenaed witness normally have a say in whether he will be called to testify. Retaliation in these circumstances afflicts punishment on a public employee for performing an act that he could not choose to avoid.

Id. The court added that the protection afforded testimonial speech was clearly established. *Id.* 1291-1292.

The Third Circuit recognized that although testimony is protected speech, like any other public employee expression, it is subject to the *Pickering* balancing test. *See Green*, 105 F.3d at 887 (holding that although a police officer's testimony at bail hearing was a matter of public concern, it was subject to the *Pickering* balancing test).[7]

The Ninth Circuit agrees that while testimonial speech is protected under the First Amendment, it is subject to the *Pickering* balancing test. In *Alpha Energy Savers, Inc. v. Hasen*, 381 F.3d 917 (9th Cir. 2004), the court found the plaintiff's affidavit filed in an employee's lawsuit, his testimony during a grievance hearing, and his agreement to be listed as a witness in judicial proceedings were all acts protected under the First Amendment. *Id.* at 923-924. The court adopted the Fifth Circuit's reasoning in *Johnson* that public employees' speech in the context of sworn testimony is

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[7]In *Green*, a police officer voluntarily testified as a character witness during a bond hearing for a known criminal. Ultimately, the court found the department was justified in reassigning the officer because of his association gave the appearance of impropriety.

protected if the testimony itself constitutes a matter of public concern. 381 F.3d at 924. As the court wrote, "we hold that a public employee's testimony addresses a matter of public concern if it contributes in some way to the resolution of a judicial or administrative proceeding in which discrimination or other significant government misconduct is at issue - even if the speech itself would not otherwise meet the *Konits* test were we to consider it in isolation." *Id.* at 927.

The Tenth Circuit has also embraced the Fifth Circuit's approach in *Johnson.* Relying on *Johnson* and this Court's decision in *Briscoe,* the Tenth Circuit recognized First Amendment protection for public employees' testimony in *Worrell v. Henry*, 219 F.3d 1197, 1204-05 (10th Cir. 2000). In *Worrell*, the plaintiff alleged a violation of his First Amendment rights when the state's attorney refused to hire him because he had previously testified as an expert witness against the state. *Id.* at 1203. Acknowledging the growing body of circuit case law recognizing First Amendment protection of testimonial speech, the court adopted the reasoning of the Third Circuit's decision in *Pro*, *supra*, and that of the Fifth Circuit in *Johnson.* 219 F.3d. at 1205-1206. Consistent with the Third and Ninth Circuits, the court also found that the protection was subject to *Pickering* balancing. *Id.*

In a case cited by the Fifth Circuit in *Johnson* and *Reeves*, the Second Circuit found that testimonial speech was protected in *Konits v. Valley Stream Central High School District*, 394 F.3d 121 (2d Cir. 2005). In *Konits*, a high school music teacher brought suit against the school district claiming that she had been retaliated against for bringing a prior lawsuit against the district. Reversing the district court's dismissal of the

plaintiff's claim, the Second Circuit first observed that "if the basis for a First Amendment retaliation claim is a lawsuit, the subject of the lawsuit must touch upon a public concern." *Id.* (citing internal citations omitted). The court found that, "[p]rotection of the courts' interest in candid and truthful testimony, coupled with the rights of discrimination victims to seek protection in legal action, makes testimony or prospective testimony in discrimination suits a matter of particular public interest." *Id.* at 125 (citing *Marshall v. Allen*, 984 F.2d 787 (7th Cir. 1993); and *Curtis v. Oklahoma City Public School Board of Education,* 147 F.3d 1200 (10th Cir. 1998)).[8]

The Seventh Circuit's view of testimonial speech is consistent and recognizes First Amendment protection of testimonial speech when the subject matter of the legal proceeding is itself a matter of public concern. In *Zorzi v. County of Putnam*, 30 F.3d 885 (7th Cir. 1994), the plaintiff initially sued the defendants under a First Amendment political association theory. Subsequent to her lawsuit, she applied for reemployment with the Sheriff's Department and was rejected on the sole basis that she had a pending lawsuit against the Sheriff and the County of Putnam. *Id.* at 890. The plaintiff sued again, arguing that her lawsuit constituted protected speech. The Seventh Circuit wrote, "if a public employee is retaliated against for filing a lawsuit, the pubic employee has no First Amendment claim unless the lawsuit involves a matter of

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[8]The Second, Third, and Ninth Circuits' agreement that the bringing of a lawsuit or that potential testimony is a protected expression represents a broader application of the First Amendment than Petitioner advocates. This petition does not present these questions because Green actually testified in court.

public concern." *Id.* In a later decision, *Salas v. Wisconsin Dept. of Corrections*, --- F.3d ---, No. 05-00139, 2007 WL 2049845 (7th Cir. July 18, 2007), the court interpreted its decision in *Zorzi* as specifically protecting testimonial speech. In *Salas*, the court found that a public employee had a First Amendment right to participate as a witness in a discrimination lawsuit, so long as the subject matter of the lawsuit involved a matter of public concern. *Id.* *8 (citing *Zorzi*, 30 F.3d at 896). Because the employee in *Salas* testified about widespread discrimination, rather than his own personal grievance, the speech was protected under the First Amendment. *Id.*

The Eighth Circuit adopted a similar position in *Herts v. Smith*, 345 F.3d 581 (8th Cir. 2003). The plaintiff in *Herts* was the director of equity of Pulaski County Special School District. She was subpoenaed to testify in a desegregation case against the district. The facts about which Dr. Herts testified were known to her because of her specialized knowledge in her position as the director of equity. *Id.* at 585-586. The Eighth Circuit found that the plaintiff's testimony related to a matter of public concern, which it balanced under *Pickering*. *Id.* at 586.

The First and Sixth circuits have signaled in *dicta* that the First Amendment protects testimonial speech. In *Rosenfeld v. Egy*, 346 F.3d 11 (1st Cir. 2003), the First Circuit observed, without discussion, that a public employee's testimony before a local board of selectmen constituted protected speech under the First Amendment. *Id.* at 15. This protection has been applied by lower courts within the circuit. *See Fletcher v. Szostkiewicz*, 190 F. Supp. 2d 217, 229 (D. Mass. 2002)(denying summary judgment based on evidence that police officer's discipline was based, at least in part, on his

testimony). The Sixth Circuit has suggested that it would support the notion that testimonial speech is protected under the First Amendment. In an unpublished table opinion, *Stokes v. Sparks*, 94 F.3d 645 (6th Cir. 1996), the court wrote, "[g]overnment officials may not retaliate against persons who have participated in constitutionally protected conduct, such as testifying at trial." *Id.* (citing *Reeves v. Claiborne County Board of Education*, 828 F.2d 1096, 1100 (5th Cir. 1987) (internal citations omitted).

The Fourth and Eleventh Circuits are more restrictive in their treatment of testimony as protected speech. In *Whalen v. Roanoke County Board of Supervisors,* 797 F.2d 170 (4th Cir. 1986)(*en banc*)(adopting the concurring and dissenting opinion from the panel decision at 679 F.2d 221), the Fourth Circuit held that a county employee's testimony before a state commission concerning his objections to the location of a power line was protected under the First Amendment. However, the court would not extend such protection to a witness testifying in a private claim of discrimination. In *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75 (4th Cir. 1988), the Fourth Circuit applied greater weight to the "content" of the speech at issue, over the "context" in which it is given. Arvinger's testimony as a witness was not afforded First Amendment protection because it related to a private dispute between a female employee and the employer, even though the context was sworn testimony during the employer's "fairness hearing." *Id.* at 79; *see also, Kirby v. City of Elizabeth City, North Carolina*, 388 F.3d 440, 446-447 (4th Cir. 2004) (employee's testimony during grievance hearing regarding the maintenance of single vehicle not of public concern).

Until recently, the Eleventh Circuit also recognized the sanctity of testimonial speech in the First Amendment context. In *Martinez,* the plaintiff was the city's director of purchasing, "responsible for ensuring that all of the City's purchases conformed to the bid procedures set forth in the City's Code of Ordinances." 971 F.2d at 710. Martinez testified during the city commission's investigation that the city manager "violated the prescribed bid procedures." *Id.* The court held that the speech was protected because her "testimony was speech that clearly affected a matter of public concern." *Id.* at 712.

The Eleventh Circuit re-affirmed *Martinez* in *Hansen v. Soldenwagner*, 19 F.3d 573 (11th Cir. 1994). Although the court found against Hansen because the protection of "vulgar, insulting, and defiant" testimony was not clearly established, *Id.* at 577-78, it nonetheless acknowledged:

> That witnesses (without fear of unwarranted reprisal from governmental employers) be able to testify truthfully in court proceedings is a matter of public importance. Public employees who allegedly suffer retaliation for providing testimony can enjoy protection under the First Amendment.

Id. at 576 (citing *Reeves*).

In its opinion below, the Eleventh Circuit interpreted *Garcetti* as a wholesale change in First Amendment jurisprudence related to testimonial speech. It overruled circuit

precedent of *Martinez* by implication.[9] The Eleventh Circuit now holds that when public employees testify truthfully in court on matters that are, in the court's view, merely consistent with or related to their employment responsibilities, the First Amendment affords no protection, even when their testimony relates to a matter of public concern. This represents a fundamental misunderstanding of this Court's precedents.

II. THE COURT BELOW MISAPPLIED *GARCETTI* IN DEROGATION OF BOTH THE SUPREME COURT'S HOLDING AND ITS OWN CIRCUIT PRECEDENTS

A. *Garcetti* did not signal a radical departure from existing federal law and did not apply to testimonial speech.

A brief review of *Garcetti* is instructive. Ceballos, a deputy district attorney for Los Angeles County, wrote a "disposition memorandum" containing his concerns about an affidavit used to obtain a criminal search warrant. 126 U.S. at 1955. It was *undisputed* that Ceballos drafted and disseminated the memo as a part of his routine, official duties as an assistant district attorney. *Id.* at 1961. After being subjected to alleged retaliation for submission of his memo, Ceballos filed suit against the Los Angeles County District Attorney and others claiming that his memo was protected under the First Amendment. *Id.* at 1956.

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[9]In a curious twist, the court cited to Martinez as conflicting intra-circuit authority rendering the law not "clearly established." (Pet. App. 9a).

This Court articulated a two-step inquiry for evaluating the free speech claims of pubic employees under *Connick v. Myers*, U.S. 138 (1983) and *Pickering*. "The first requires determining whether the employee spoke as a citizen on a matter of public concern .... [T]hen[,] the question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* at 1958.

While *Garcetti* addressed the threshold question of whether the speech at issue belongs to the public employee or to the employer,[10] it did not alter its prior holdings that a government employer may not treat its employees differently in areas where all citizens speech is otherwise protected. *Id.*

In *Garcetti*, this Court was careful to emphasize that a citizen's status as a government employee does not wipe away her First Amendment rights. "[T]he Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.* at 1958 (citing *Perry*, 408 U.S. at 597). The Court's decision in *Perry* involved a government employee who protested his employer's actions by, among other things, testifying before a legislative committee. Public employees do not lose their right to petition the government merely because the issues about which they complain are related to their

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[10]The Court framed the issue as whether the employee was speaking "pursuant to his official duties." 126 S.Ct. at 1955.

employment. Here, Petitioner, in her role as private citizen, testified about the facts known to her *because of* her employment, but not *pursuant to* her employment.

The Court highlighted the importance of this distinction: "The significant point is that the memo was written pursuant to Ceballos's official duties .... [because] [i]t simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* These considerations are entitled to no weight in the context of public employees' sworn judicial testimony. Decisions from the Second, Third, Fifth, Ninth and Tenth Circuits amply explain the rational for protecting public employees' testimony under the First Amendment. While a government employer has an interest in controlling its employees's speech when that speech is expressed on the employer's behalf, id. at 1960, no justification exists for government control over in-court testimony.

This Court did not address the issue of testimonial speech in *Garcetti*. Before that case reached the Court, the lower court restricted its analysis to Ceballos's disposition memo. The lower court never addressed whether Ceballos's verbal communications or his sworn testimony constituted protected speech. *Ceballos v. Garcetti*, 361 F.3d 1168, 1173 (9th Cir. 2004) ("for purposes of summary judgment, Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment; accordingly, we need not determine here whether similar protection should be afforded to his other communications"). Consequently, this Court's decision in *Garcetti* was not based on Ceballos's in-court testimony. The Court specifically acknowledged that the Ninth Circuit restricted its opinion solely to the disposition

memo and not the other forms of speech, 126 U.S. at 1956, and repeatedly emphasized that its decision concerned Ceballos's disposition memo. *Id.* at 1960. In his dissenting opinion, Justice Souter pointed out the importance of this distinction. "The Court remands because the Court of Appeals considered only the disposition memorandum ...." *Id.* at 1971 (Souter, J., dissenting). Consequently, the Supreme Court's decision expressed no opinion regarding First Amendment protections afforded to truthful testimony given during the course of judicial proceedings. *Id.* at 1973 (Souter, J., dissenting).

B. The Eleventh Circuit's expansion of *Garcetti* encourages government intrusion into the judiciary's truth-seeking function.

There is no dispute that both the district court and the Court of Appeals recognized that Green's speech was exclusively in the form of "in- court testimony." (Pet. App. 4a, 18a). The district court, after seeking additional argument from the parties regarding the impact of *Garcetti* on this case, concluded that the testimonial character of Green's speech removed it from the holding in *Garcetti*. (Pet. App. 15a). The district court noted that Green disputed that her testimony was a part of her "official duties." (Pet. App. 15a).

The district court found the law to be clearly established that "plaintiff's in-court testimony was a form of protected speech." Legally, the district court relied on circuit precedent in which the Eleventh Circuit recognized testimonial speech as protected under the First Amendment. (Pet. App. 31a) (citing *Martinez*, 971 F.2d at 712). Factually, the district court noted Barrett's admissions that (1) she was familiar with the First

Amendment, (2) she recognized that Green's testimony regarding the safety of the jail was protected free speech, and (3) if she had fired Green because of her speech, "it would be against the law." (Pet. App. 31a-32a). Based upon all of these findings, the district court determined that Barrett was not entitled to qualified immunity. (Pet. App. 32a).

The court below ignored the important distinction between Green's testimony in the present case and the written memo in *Garcetti*. The court completely ignored the context and form of Green's speech as in-court testimony. The court made no effort to distinguish its own precedent or the significant cases from other circuits addressing the exact issue before it. Instead, the court glossed over this critical distinction, assuming without discussion that the testimonial nature of Green's speech was immaterial under *Garcetti*.

As for Green's actual duties, as the district court pointed out, the parties were in dispute about the nature of Green's responsibilities as they related to her in-court testimony. Again, ignoring these disputed facts, the Eleventh Circuit stated, "Green does not dispute that she testified at the hearing *because* she was the chief jailer . . . ." (Pet. App. 9a) (*emphasis added*). Not only is this finding unsupported by the record, it avoids making any practical determination regarding whether Green testified "pursuant to her official duties." The court's observation is vague and indicates only that Green testified due to her knowledge of facts acquired through her position. This unprincipled analysis would result in any public employee losing constitutional protection of her speech when that speech merely depends upon knowledge she gained in the workplace. To the contrary, "public employees are often members of the

community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues." *San Diego v. Roe*, 543 U.S. 77, 82 (2004).

The court below failed to engage in any meaningful First Amendment analysis, particularly when determining whether Green's testimony fell within her "official duties." The court's gloss is a semantic sleight-of-hand, contravening the essential underpinnings of *Garcetti*: that Ceballos's speech was, de facto, speech belonging to the employer. The same cannot be said about Green, who testified under oath and uttered the undesired testimony while subject to cross examination. Her speech was far removed from her public employer's control. Constrained by her moral and legal obligations to fulfill her oath, Green recounted facts that she knew as a consequence of her employment, irrespective of her official duties.

III. TESTIMONIAL SPEECH IS PROTECTED REGARDLESS OF WHETHER THE WITNESS'S TESTIMONY RELATES TO HER EMPLOYMENT

Public employees' in-court testimony is protected under the First Amendment. This right is qualified only to the extent that the *Pickering* balancing test favors the public employer's need to control its own message, delivered by an employee. The Court's decision in *Garcetti* accepted the long-held proposition "that widespread costs may arise when dialogue is repressed." 126 S.Ct. at 1959. Nowhere are the costs to society greater than

when the government seeks to manipulate testimony in our courts to fulfill its own selfish interests.

Green had a choice to make when she was called to the stand and raised her hand, swearing to tell the truth before the Fulton County Superior Court: lie to protect the Sheriff's image and thereby save her job; or tell the whole truth and promote the safety of her fellow deputies and security for the citizens of the county. According to the Eleventh Circuit's decision, this conflict of interest is the accepted consequence of this Court's decision in *Garcetti*. But, in promoting this false choice, the Eleventh Circuit got it wrong.

This case exemplifies the dangers inherent in government-regulated testimony. Below, the Sheriff argued that Green's testimony about unsafe conditions of the jail was overwhelmed by the superficial need to maintain public confidence through the illusion of safety. Had Green acquiesced to this perverted view of "public interest," a convicted murder would still be free to roam the halls of the jail, perhaps continuing his quest to free himself from confinement to kill again. Instead, thanks in great part to Green's sacrifice, he is safely housed by the State of Georgia in its maximum security prison.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant certiorari to review the decision of the Eleventh Circuit Court of Appeals.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 06-15104-BB

SHERIFF JACQUELYN H. BARRETT,
Defendant/Appellant,

v.

SHIRLIE D. GREEN,
Plaintiff/Appellee.

May 17, 2007

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF GEORGIA

ON PETITION(S) FOR REHEARING AND PETITION(S)
FOR REHEARING EN BANC

Before: TJOFLAT, HULL and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

E. R. COX
U.S. CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-15104-BB

SHIRLIE D. GREEN,

Plaintiff/Appellee,

v.

SHERIFF JACQUELYN H. BARRETT,

Defendant/Appellant.

March 14, 2007

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Before TJOFLAT, HULL and COX, Circuit Judges.

PER CURIAM:

In this appeal, we consider whether an employer is entitled to qualified immunity for firing a public employee as a result of testimony the employee gave pursuant to her official

duties. We reverse the district court's denial of qualified immunity to the employer.

I. Facts and Procedural History

On March 26, 2003, Shirlie D. Green, then Chief Jailer at the Fulton County Jail, testified at an emergency hearing in Fulton County Superior Court. The hearing had been called at the request of Fulton County Sheriff Jacquelyn Barrett to consider whether Jamil Abdullah Al-Amin, convicted murderer of a Fulton County deputy sheriff, should be transferred from the Fulton County Jail to a maximum security state prison. A week earlier, Al-Amin had attempted to escape from the Fulton County Jail. Before he was apprehended, security cameras showed Al-Amin opening his jail cell and moving freely about the jail.

Green testified at the hearing that "many of the cell door locks were either broken or could be easily jammed by pris ners, including locks in the area of the jail used to house high-security prisoners such as Al-Amin," and that "prisoners regularly let themselves out of the cells at night." (R.1-12 ¶¶ 25, 26.) Green also testified that she thought the jail was "unsafe ... insofar as housing inmates like Al-Amin [was] concerned." (R.1-12 ¶ 28.)

The next day, Barrett fired Green. Green's termination letter gave no reason for the firing, but Green alleges that Barrett told Green she was being fired because of her testimony. (R. 1-12 ¶ 33.) In a story published in the Atlanta Journal-Constitution the day after the firing, Barrett is quoted as saying, "I was so concerned about that testimony that the chief gave

that she was terminated today." (R. 1-12 ¶ 35.)

Green sued Barrett, individually and in her official capacity, and Fulton County, pursuant to 42 U.S.C. § 1983 and Article I, Section I, Paragraph V of the Georgia Constitution. The amended complaint alleges that Barrett violated Green's free speech rights as protected by the First Amendment to the United States Constitution and the above cited provision of the Georgia Constitution.

Fulton County and Barrett moved for summary judgment. On July 26, 2005, the district court granted Fulton County's motion. In the same order, the district court denied Barrett's motion, finding that she was not entitled to qualified immunity or official immunity. Barrett filed a notice of appeal in this court, but her appeal was dismissed for failure to prosecute.

When the case proceeded in the district court, Barrett renewed her motion for summary judgment on qualified immunity grounds in light of the newly published opinion in *Garcetti v. Ceballos*, ___U.S.___, 126 S. Ct. 1951 (2006). On September 6,2006, the district court denied Barrett's renewed motion, finding that *Garcetti* did not change its conclusion that Barrett was not entitled to qualified immunity. Barrett appeals the September 6, 2006 order.

II. Issue on Appeal & Standard of Review

In this interlocutory appeal, we consider whether the district court erred in denying Barrett qualified immunity on Green's section 1983 claim. Green argues that this court does

not have jurisdiction to consider the appeal because the parties dispute questions of fact. However, when considering the merits of the appeal, we may "accept as true all facts the district court assumed when it denied summary judgment on qualified immunity grounds." *See Badia v. City of Miami*, 133 F.3d 1443, 1445 (11th Cir. 1998) (citations omitted). The district court found that Green's testimony "played a substantial role in [Barrett's] decision to fire" Green. (R. 3-97 at 14.) Accepting that fact, what remains is a purely legal question - whether Barrett is entitled to qualified immunity for firing Green because of her testimony - that we have jurisdiction to consider de novo. *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817 (1985) ("[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."); *Cagle v. Sutherland*, 334 F.3d 980, 985 (11th Cir. 2003) ("A defendant's entitlement to qualified immunity is a question of law to be reviewed de novo.").

Though Barrett's appellate brief raises the question, we do not consider whether the district court erred in denying her official immunity on Green's state law claims. That question is not properly part of this appeal. It was not addressed in the district court's September 6, 2006 order, and appeal of the July 28, 2005 order is untimely.

Neither do we address the question of whether Green's claims against Barrett, in her official capacity, are properly a part of the lawsuit. Barrett's Notice of Appeal states that she appeals the district court's order in both her official and individual capacities. The district court held that this a [sic] suit

against Barrett in her official capacity is a suit against the State of Georgia. Because Barrett makes no arguments on behalf of the state in her briefs and the scope of our review is limited to the qualified immunity question, we do not discuss this issue.

III. Discussion

We apply a two-step analysis to determine when an official acting within her discretionary authority[1] is eligible for qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001). First, we ask whether the facts, taken in the light most favorable to the party asserting the injury, show that the conduct violated a constitutional right. *Id.* Second, if a constitutional right was violated under the plaintiff's version of the facts, we must then determine "whether the right was clearly established." *Id.*

To determine whether Barrett violated Green's First Amendment right to free speech, we first determine whether Green's testimony constitutes speech protected by the First Amendment. To be protected speech, Green's testimony must be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690 (1983). The district court found that Green's testimony was speech on a matter of public concern because it pertained to matters of public safety. (R.3-97 at 12.) We disagree.

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[1]The parties do not dispute that Barrett was acting within her discretionary authority when she fired Green.

Our precedent clearly holds that "[t]he fact that [the communicated] information may be of general interest to the public . . . does not alone make it of 'public concern' for First Amendment purposes." *Morris v. Crow*, 142 F.3d 1379, 1381 (11th Cir. 1998) (citing *Connick*, 461 U.S. at 148 n.8, 103 S. Ct. at 1691 n.8). The key consideration is the purpose of the communication. *Id.* at 1381, 1382. If a public employee plaintiff speaks as a citizen with the purpose of raising a matter of public concern, then the speech is generally protected, subject to some narrow exceptions. *Garcetti*, 26 S. Ct. at 1958; *Morris*, 142 F.3d at 1382. However, if a plaintiff speaks as part of her duties as a public employee, the speech is not protected by the First Amendment. *Garcetti*, 126 S. Ct. at 1959-1960; *Morris*, 142 F.3d at 1382. This distinction is not affected by the fact that the plaintiff made the statements in testimony. *Morris*, 142 F.3d at 1383 ("The mere fact that Morris's statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech."); *see also Garcetti*, 126 S. Ct. at 1960 (holding broadly "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

Green does not dispute that she testified at the hearing because she was the Chief Jailer, the public employee responsible for the conditions at the jail. Nor does she contend that the purpose of her statements was to communicate to the public her concerns about the general safety of the Fulton County Jail or the necessity for change in the conditions of the jail. Rather, her statements were made in a hearing conducted for the specific purpose of assessing whether the jail was a safe

place for inmate Al-Amin to be housed.

On these facts, Green's testimony was given pursuant to her official duties as Chief Jailer. Therefore, it is not protected by the United States Constitution. Barrett's firing of Green did not violate Green's First Amendment right to free speech.

Additionally, even assuming Green's testimony were considered speech on a matter of public concern, this was not clearly established by Supreme Court or Eleventh Circuit precedent at the time Barrett fired Green. Indeed, while there is Eleventh Circuit precedent supporting the proposition that a public employee may have a First Amendment interest in testimonial communications made in the context of investigative proceedings, *see Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), there is also (as is discussed above) long-standing circuit precedent that not all communications on matters of general interest to the public enjoy First Amendment protection, even if those communications are made in the course of subpoenaed testimony. *See Morris*, 142 F.3d 1379.

When Green gave her testimony, she was not, as a matter of law, exercising a clearly established First Amendment right. Therefore, Barrett, in her individual capacity, is entitled to qualified immunity on Green's section 1983 claim.

IV. Conclusion

For the foregoing reasons, the district court's order denying Barrett qualified immunity individually is REVERSED, and the action is REMANDED to the district

court with instruction to enter judgment in favor of Barrett individually on Green's section 1983 claim.

REVERSED AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
Atlanta Division

No. 1:04-CV-00014-MHS

SHIRLIE D. GREEN,

Plaintiff,

v.

SHERIFF JACQUELYN H. BARRETT,

Defendant.

September 8, 2006

ORDER

This action is before the Court on the Court's own motion for reconsideration of its denial of defendant Barrett's motion for summary judgment in light of the Supreme Court's recent decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

The parties have filed supplemental briefs in accordance with the Court's Order of June 22, 2006.[1] For the following reasons, after reconsideration in light of *Garcetti*, the Court affirms its decision denying defendant's motion for summary judgment.

Background

On March 26, 2003, plaintiff Shirlie D. Green, then Chief Jailer at the Fulton County Jail, testified at an emergency hearing in Fulton County Superior Court. The hearing had been called at the request of defendant Fulton County Sheriff Jacquelyn Barrett to consider whether Jamil Abdullah Al-Amin, the convicted murderer of a Fulton County deputy sheriff, should be transferred from the Fulton County Jail to a maximum security state prison. A week earlier Al-Amin had attempted to escape. Before he was apprehended, security cameras had observed Al-Amin opening his jail cell and moving freely about the jail.

Green testified at the hearing regarding security at the jail. Specifically, according to her complaint, she stated that "many of the cell door locks were either broken or could be easily jammed by prisoners, including locks in the area of the jail used to house high-security prisoners such as Al-Amin," and that "prisoners regularly let themselves out of their cells at night." (Am. Compl. ¶¶ 25-26.) Green also testified that she thought the jail was "unsafe" insofar as housing inmates like

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[1]Defendant Barrett styled her submission as a renewed *motion* for summary judgment, but the Court will treat it as a supplemental brief in support of defendant's original motion for summary judgment.

Al-Amin was concerned. (*Id.* ¶ 28.)

The following day, Sheriff Barrett fired Green. Although Green's termination letter did not give a reason for the firing, Green alleges that Barrett told her she was being fired because of her testimony. (Am. Compl. ¶ 33.) In a story published in the Atlanta Journal-Constitution the day after the firing, reporter Steve Visser quoted Barrett as saying, "I was so concerned about that testimony that the chief gave that she was terminated today. It's a safe building." (Am. Compl. ¶ 35.)

On October 31, 2003, Green filed this action in Fulton County Superior Court against Barrett, both individually and in her official capacity, alleging that Barrett fired her because of her testimony on a matter of public concern in violation of Green's free speech rights under the First Amendment to the U.S. Constitution and Article I, Section I, Paragraph V of the Georgia Constitution. Green sought both compensatory and punitive damages, as well as reinstatement. Barrett removed the case to this Court, and Green subsequently amended her complaint to add Fulton County as a defendant.

On July 26, 2005, the Court entered an Order granting defendant Fulton County's motion for summary judgment. In the same Order, the Court denied defendant Barrett's motion for summary judgment on grounds of qualified immunity. Applying the four-part balancing test derived from the Supreme Court's decision in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and construing the evidence in the light most favorable to plaintiff, the Court concluded that plaintiff had established that defendant violated her clearly established First Amendment rights. Order

at 12-16.

Subsequently, the parties filed their proposed consolidated pretrial order and engaged in an unsuccessful effort at mediation. Then, on May 30, 2006, the Supreme Court issued its decision in Garcetti v. Ceballos. In that case, Ceballos, a deputy district attorney, alleged that he was disciplined for a memorandum he submitted to his superiors, in which he argued that a prosecution should be dropped due to what he believed was police misconduct.[2] The Supreme Court found that the controlling factor in the case was that Ceballos'"expressions were made pursuant to his duties as a calendar deputy." *Garcetti*, 126 S. Ct. at 1959-60. The Court held that "when public officials make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employee discipline." *Id.* at 1960.

Recognizing that *Garcetti* might apply to this case, the Court directed the parties to file supplemental briefs addressing whether defendant Barrett is entitled to summary judgment under the holding in *Garcetti*.

Discussion

Plaintiff argues that *Garcetti* is not controlling for two reasons. First, plaintiff notes that the holding in *Garcetti* was limited to the internal memorandum Ceballos submitted to his

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[2]Ceballos also claimed that he was disciplined in part due to his truthful testimony at a hearing on a defense motion in the case.

superiors and did not address whether First Amendment protection should be afforded to Ceballos' in-court testimony, which is the issue presented in this case. Second, plaintiff argues that even if *Garcetti* did apply to in-court testimony, plaintiff's speech was still protected in this case because she did not testify pursuant to her official duties as Chief Jailer.

In response, defendant argues that plaintiff reads *Garcetti* too narrowly. Defendant disputes that *Garcetti* drew any distinction between written speech and testimonial speech. Defendant also argues that the undisputed evidence shows that plaintiff was called to testify solely because of the knowledge she possessed regarding security at the jail due to her position as Chief Jailer. Therefore, defendant argues, regardless of whether "court testimony" was included in plaintiff's formal job description, her testimony was given "pursuant to her official duties" and thus is not protected under the holding in *Garcetti*.

The Court concludes that *Garcetti* is not controlling in this case. Plaintiff correctly notes that the *Garcetti* holding is limited to the memorandum Ceballos wrote to his superiors. The opinion did not address the issue presented here, i.e., whether Ceballos' in-court testimony constituted protected speech. *Garcetti*, 126 S. Ct. at 1971, 1972-73 (Souter, J., dissenting). This is an important distinction. As Justice Souter observed in his dissent, "the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process." *Id.* at 1973.

Thus, even if plaintiff's testimony was "pursuant to her official duties," nothing in *Garcetti* requires a finding that such testimony was unprotected. Furthermore, there is Eleventh

Circuit authority that such speech is protected. *See Martinez v. City of Opa-Locka. Fla.*, 971 F.2d 708, 712 (11th Cir. 1992) (testimony by city's purchasing department director regarding city purchasing practices was protected). Accordingly, even when viewed in light of *Garcetti*, the Court concludes that its Order denying defendant's motion for summary judgment on grounds of qualified immunity was correct.

Summary

For the foregoing reasons, following reconsideration upon the Court's own motion, the Court's Order of July 26, 2005 [sic] [#97], denying defendant Barrett's motion for summary judgment [#76, #77] is AFFIRMED.

IT IS SO ORDERED, this day of 8th day of September, 2006.

/s/
Marvin K. Shoob, Senior Judge
United States District Court
Northern District of Georgia

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
Atlanta Division

No. 1:04-CV-00014-MHS

SHIRLIE D. GREEN,

Plaintiff,

v.

SHERIFF JACQUELYN H. BARRETT,

Defendant.

July 28, 2005

ORDER

This action is before the Court on defendants' motion for summary judgment.[1] For the following reasons, the Court

[1]Although nominally brought only on behalf of defendant Barrett, the motion argues that defendant Fulton County is also entitled to summary judgment. Since plaintiff has responded to the

grants the motion as to defendant Fulton County but denies the motion as to defendant Barrett.

Background

On March 26, 2003, plaintiff Shirlie D. Green, then Chief Jailer at the Fulton County Jail, testified at an emergency hearing in Fulton County Superior Court. The hearing had been called at the request of defendant Fulton County Sheriff Jacquelyn Barrett to consider whether Jamil Abdullah Al-Amin, the convicted murderer of a Fulton County deputy sheriff, should be transferred from the Fulton County Jail to a maximum security state prison. A week earlier Al-Amin had attempted to escape. Before he was apprehended, security cameras had observed Al-Amin opening his jail cell and moving freely about the jail.

Green testified at the hearing regarding security at the jail. Specifically, according to her complaint, she stated that "many of the cell door locks were either broken or could be easily jammed by prisoners, including locks in the area of the jail used to house high-security prisoners such as Al Amin," and that "prisoners regularly let themselves out of their cells at night." (Am. Compl. ¶¶ 25-26.) Green also testified that she thought the jail was "unsafe" insofar as housing inmates like Al-Amin was concerned. (*Id.* ¶ 28.)

The following day, Sheriff Barrett fired Green. Although Green's termination letter did not give a reason for the firing,

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motion as one on behalf of both defendants, the Court will treat it as such.

Green alleges that Barrett told her she was being fired because of her testimony. (Am. Compl.¶ 33.) In a story published in the Atlanta Journal-Constitution the day after the firing, reporter Steve Visser quoted Barrett as saying, "I was so concerned about that testimony that the chief gave that she was terminated today. It's a safe building." (Am. Compl. ¶ 35.)

On October 31, 2003, Green filed this action in Fulton County Superior Court against Barrett, both individually and in her official capacity, alleging that Barrett fired her because of her testimony on a matter of public concern in violation of Green's free speech rights under the First Amendment to the U.S. Constitution and Article I, Section I, Paragraph V of the Georgia Constitution. Green sought both compensatory and punitive damages, as well as reinstatement. Barrett removed the case to this Court, and Green subsequently amended her complaint to add Fulton County as a defendant. The amended complaint asserts the same claims against both Barrett and Fulton County.

Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when there is "no genuine issue as to any material fact. . . and the moving party is entitled to judgment as a matter of law." In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court held that this burden could be met if the moving party demonstrates that there is "an absence of evidence to support the non-moving party's case." *Id.* at 325. At that point, the burden shifts to the non-moving party to go beyond the pleadings and present specific evidence giving rise to a triable issue. *Id.* at 324.

The Court, however, must construe the evidence and all inferences drawn from the evidence in the light most favorable to the non-moving party. *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). Moreover, because the summary judgment standard mirrors that required for a judgment as a matter of law, summary judgment is not appropriate unless "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 250 (1986) (citation omitted).

Discussion

Defendant Barrett raises immunity defenses to plaintiff's claims against her in both her official and individual capacities. First, insofar as she is sued in her official capacity, defendant contends that Eleventh Amendment immunity bars plaintiff's claims. Insofar as she is sued in her individual capacity, defendant Barrett argues that she is entitled to qualified immunity from plaintiff's federal claim and official immunity from plaintiff's state law claim. Apart from these immunity defenses, defendant Barrett also argues that the evidence is insufficient to support plaintiff's claim that she was fired in retaliation for her testimony. Finally, defendant Fulton County contends that it is entitled to summary judgment because plaintiff's termination was not the result of any official policy or custom of the County. The Court will address each of these arguments in turn.

I. Eleventh Amendment Immunity

Defendant Barrett first argues that plaintiff's claims

against her in her official capacity are barred by the Eleventh Amendment because, with respect to the particular functions at issue in this case, she was acting on behalf of the State.[2] Defendant relies on *Manders v. Lee*, 338 F.3d. 1304, 1305-06 (11th Cir. 2003), in which the Eleventh Circuit held that the Sheriff of Clinch County functioned as an "arm of the State" in establishing use-of-force policy at the jail and in training and disciplining his deputies in that regard, and was therefore entitled to Eleventh Amendment immunity for these particular functions. Defendant contends that the particular function at issue in this case is the hiring and firing of at-will jail employees, and that the sheriff's authority in this regard is derived from state law. Therefore, in firing plaintiff, defendant argues, she was acting as an arm of the State and is entitled to Eleventh Amendment immunity.

In response, plaintiff contends that *Manders* is inapplicable because Fulton County Sheriff's Department employees are covered by the Fulton County Civil Service System, which limits the sheriff's ability to hire, fire, and discipline employees.[3] Although plaintiff does not dispute that

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[2]The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[3]Plaintiff also argues that Eleventh Amendment immunity was abrogated by passage of 42 U.S.C. § 1983, and that the Eleventh Amendment does not apply to suits between a state and its own citizens. Both arguments are precluded by well settled

she was an unclassified employee whom the sheriff could terminate at will, she contends that defendant's authority to terminate her derived not from state law but from Fulton County's personnel policies. Consequently, plaintiff argues, in terminating plaintiff; defendant Barrett was acting as an arm of Fulton County and not the State.[4] Alternatively, plaintiff argues that even if Eleventh Amendment immunity would otherwise apply, defendant Barrett waived such immunity by removing this case from state to federal court.

The Court concludes that defendant Barrett was acting as an arm of the State when she fired plaintiff, and that she would therefore be entitled to assert Eleventh Amendment immunity from an official capacity suit brought against her in federal court. However, since defendant voluntarily invoked the jurisdiction of this Court by removing the case from state court, the Court concludes that she has waived Eleventh Amendment immunity.

A sheriff's authority to hire and fire deputies derives from O.C.G.A. § 15-16-23, which provides that "[s]heriffs are authorized in their discretion to appoint one or more deputies."

Supreme Court authority. *See Quern v. Jordan*, 440 U.S. 332, 338-45 (1979); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

[4]Plaintiff's reliance on a local constitutional amendment authorizing Fulton County to maintain and operate a detention facility is misplaced. *See* 1972 Ga.Laws 1439. That provision, which does not mention the sheriff, merely authorizes the county to operate its own detention facility apart from the jail operated by the sheriff.

In accordance with this provision, a long line of Georgia cases has held that "[d]eputies, including those serving as jailers, are employees of the sheriff and not the county." *Manders*, 338 F. 3d at 1311 (citing cases). Pursuant to O.C.G.A. § 36-1-21, a sheriff may elect to have his or her deputies covered by the county civil service system. However, even if such an election is made, the sheriff retains the sole authority, derived from O.C.G.A. § 15-16-23, to hire and fire deputies, subject to the rules of the applicable civil service system.[5] *See Wayne County v. Herrin*, 210 Ga. App. 747, 753 (1993). Therefore, notwithstanding plaintiff's coverage by the Fulton County Civil Service System, plaintiff was an employee of the sheriff, not the County; and the sheriff's authority to terminate plaintiff was derived from state law, not county personnel procedures. It follows that defendant Barrett was acting as an arm of the State

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[5]Plaintiff also relies on O.C.G.A. § 42-4-1(a), which provides: "By virtue of their offices, sheriffs are jailers of the counties and have the authority to appoint other jailers, subject to the supervision of the county governing authority, as prescribed by law." Plaintiff contends that this provision shows the sheriff's appointment of jailers is subject to county oversight. However, O.C.G.A. § 42-4-1 applies to the appointment of jailers who are not deputy sheriffs, *see Manders*, 338 F.3d at 1311 n.14; while this case involves a jailer who was a deputy sheriff. Furthermore, like O.C.G.A. § 15-16-23, O.C.G.A. § 42-4-1 must be read together with O.C.G.A. § 36-1-21 "to mean that the sheriff may appoint his non-deputy jailers 'at will' under O.C.G.A. § 42-4-1, but also may elect in writing to make their appointment subject to the county civil service system and thereby subject to county supervision as prescribed by law in O.C.G.A. § 36-1-21." *Id.*

when she terminated plaintiff, and that Eleventh Amendment immunity would apply if plaintiff had filed this action in federal court.

However, in *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002), the Supreme Court held that "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objections to litigation of a matter . . . in a federal forum." Thus, a state waives its Eleventh Amendment immunity when it removes a case from state court to federal court. *Id.* at 616. Although *Lapides* involved only state law claims as to which the state had waived its sovereign immunity, defendant points to no reason why the rule announced in that case should not also apply here. The Court concludes that defendant Barrett waived her Eleventh Amendment immunity by removing this case to federal court. She is therefore subject to suit in this Court in her official capacity.[6]

II. Qualified Immunity

Defendant Barrett contends that the doctrine of qualified immunity protects her from suit in her individual capacity for

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[6]Plaintiff may not recover damages from defendant Barrett in her official capacity because such a claim is essentially a claim against the State, and a State is not a person against whom a § 1983 claim for money damages may be asserted. *Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989). However, she may pursue her claim for prospective relief in the form of reinstatement. *Id.* at 71 n.10.

violating plaintiff's First Amendment rights. In response, plaintiff argues that the doctrine does not apply because her discharge violated clearly established rights of which defendant Barrett was admittedly aware. The Court concludes that defendant Barrett is not entitled to qualified immunity.

The doctrine of qualified immunity shields government officials from liability to the extent that "their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). Evaluation of the defense involves a two-step inquiry: "first, whether the defendant's conduct violated a clearly established constitutional right; and, second whether a reasonable government official would have been aware of that fact." *Chesser v. Sparks*, 248 F.3d 1117, 1122 (11th Cir. 2001).

Turning to the first step of the inquiry, to determine whether defendant Barrett violated plaintiff's clearly established First Amendment rights, the Court applies the four-pronged test based on the Supreme Court's decision in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). First, the Court considers whether plaintiff's speech is "'fairly characterized as constituting speech on a matter of public concern." *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989)(quoting *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)). Second, if so, the Court applies the *Pickering* balancing test, "which weighs the employee's free speech interest against 'the interest of the state, as an employer, in promoting the efficiency of the public services it performs.'" *Chesser*. 248 F.3d at 1122 (quoting *Pickering*, 391 U.S. at 568). Third, if plaintiff's interests outweigh those of defendant Barrett as her employer, the Court considers whether the speech played

a "substantial part" in defendant Barrett's decision to discharge plaintiff. *Id.* at 1123 (quoting *Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11th Cir. 1996)). Fourth, if it did, the Court must determine whether defendant Barrett has shown that she would have discharged plaintiff regardless of the protected speech. *Id.*

Viewing the evidence in the light most favorable to plaintiff, the Court concludes that plaintiff has satisfied all four prongs of the *Pickering* test. First, speech addresses a matter of public concern if it relates "to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). In making this determination, the Court examines "the content, form, and context of the employee's speech." *Chesser,* 248 F.3d. at 1123. Here, the content of plaintiff's speech concerned security at the Fulton County Jail and whether the jail could safely house a high-profile inmate convicted of murdering a deputy sheriff and sentenced to life imprisonment without the possibility of parole. The form of the speech was sworn testimony before the superior court. The context was an investigation by the court, requested by the sheriff after an escape attempt by the inmate, to determine whether the inmate should be transferred to the state prison system. Under these circumstances, plaintiff's speech clearly addressed a matter of public concern. *Cf. Martinez v. City of Opa-Locka, Fla.*, 971 F.2d 708, 712(11th Cir. 1992)(plaintiff's testimony before a board of inquiry concerning expenditure of public funds in violation of city's code of ordinances clearly affected a matter of public concern); *see also Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990)(*en banc*)(issues relating to police protection and public safety are matters of public concern).

Second, the Court "must consider several factors in balancing the state's interest in efficient provision of public services against [plaintiff's] speech interest, including (1) whether the *speech at issue* impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." *Bryson,* 888 F.2d at 1567 (quoting *Morales v. Stierheim*, 848 F.2d 1145, 1149 (11th Cir. 1988)(emphasis in original). In this case, rather than impeding the government's ability to perform its duties efficiently, plaintiff's testimony was in furtherance of the sheriff's responsibility to provide a safe and secure jail.[7] The time, place, and manner of plaintiff's expression was clearly proper, and the context in which she made her statements *required* her to furnish information regarding jail security. Clearly, therefore, plaintiff's free speech rights were not outweighed by the sheriff's interest in providing efficient government services. *Cf. Martinez*. 971 F.2d at 712.

Third, as to whether plaintiff's speech played a substantial part in defendant's decision to fire her, plaintiff was fired the day after her testimony, and there is no evidence that defendant Barrett intended to fire plaintiff before she testified. In her deposition, plaintiff testified that in response to her asking why she was being fired, defendant said: "Because of your testimony, I have to let you go." (Green Dep. at 61.) Moreover, defendant does not dispute the accuracy of an Atlanta Journal-Constitution article, which quoted her as saying: "I was

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[7]Defendant Barrett admitted that plaintiff's testimony had no negative impact on the operation of the jail. (Barrett Dep. at 120-21.)

so concerned about that testimony that the Chief gave that she was terminated today." (Barrett Dep. at 158-59.) Thus, the evidence is overwhelming that plaintiff's speech played a substantial role in defendant's decision to fire her.

Finally, the evidence does not support a finding that defendant Barrett would have terminated plaintiff regardless of her protected speech. Defendant claims that she fired plaintiff solely because of her failure to keep her apprised of problems at the jail (Barrett Dep. at 47-48), but the evidence does not support this claim. Contrary to her contention, the evidence shows that Barrett had known for some time that inmates routinely broke door hinges and jammed locks to escape their cells. (Barrett Dep. at 102, 164-65.) Indeed, Barrett admitted that the problem of broken door locks was "nothing new" (Barrett Dep. at 162), and that even before she learned of plaintiff's testimony, she told a reporter she "didn't dispute . . . that at night prisoners could leave their cell and enter other cells." (Barrett Dep. at 164.) In addition, defendant's claim that plaintiff's performance was deficient is belied by plaintiff's performance appraisals, which were either "outstanding" or "acceptable." Even if defendant believed plaintiff's performance was deficient, such belief was never communicated to plaintiff and does not explain defendant's decision to terminate plaintiff immediately after reading the news report of her testimony. Thus, the evidence does not support a finding that defendant would have reached the same decision in the absence of plaintiff's protected speech.

Turning to the second step of the qualified immunity inquiry, the law was clearly established on the date defendant fired plaintiff that plaintiff's in-court testimony was a form of

protected speech. *See Martinez*, 971 F.2d at 712; *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989); *Green v. Philadelphia Housing Auth.*, 105 F.3d 882, 887(3d. Cir. 1997). In fact, Barrett testified that she was familiar with the First Amendment of the Constitution (Barrett Dep. at 250), and that she recognized that plaintiff's testimony regarding the safety of the Fulton County Jail was constitutionally protected speech. (*Id.* at 214-15.) Defendant Barrett acknowledged that if she terminated plaintiff because of her in-court testimony, "it would be against the law." (*Id.* at 251-52.)

Accordingly, because the evidence supports a finding that defendant fired plaintiff in retaliation for her in-court testimony, and because plaintiff's free speech rights were clearly established and defendant Barrett admittedly knew that terminating an employee for exercising those rights would be illegal, defendant is not entitled to qualified immunity.[8]

III. Official Immunity

Under Georgia law, government officials enjoy immunity from liability for their discretionary acts committed within the scope of their authority unless "they act with actual malice or with actual intent to cause injury." Ga.Const. Art. I, § 2, ¶ 9(d). Defendant Barrett contends that there is no evidence

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[8]For the same reasons, defendant Barrett's alternative argument that she is entitled to summary judgment because the evidence does not support plaintiff's claim that she was fired in retaliation for her testimony is also without merit.

that in terminating plaintiff she was acting with actual malice or intent to cause injury. As discussed above, however, the evidence supports a finding that defendant fired plaintiff in retaliation for her exercise of free speech rights protected under both the U.S. and Georgia Constitutions. This evidence is sufficient to support a finding that defendant acted with the requisite malice or intent to cause injury. Accordingly, the Court concludes that defendant Barrett is not entitled to official immunity on plaintiffs state law claim.

IV. Fulton County

Defendant Fulton County contends that it is entitled to summary judgment because there is no evidence that plaintiff's termination was the result of any official policy or custom of the County. The Court agrees. As discussed above, defendant Barrett was acting as an arm of the State and not the County when she fired plaintiff. Therefore, there is no basis for holding Fulton County liable for the sheriff's action. *See Grech v. Clayton County*, 335 F.3d 1326, 1347-48 (11th Cir. 2003). Accordingly, defendant Fulton County is entitled to summary judgment on plaintiff's claims.

Summary

For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART defendants' motion for summary judgment [#77-1] and DISMISSES plaintiff's claims against defendant Fulton County.

IT IS SO ORDERED, this 28th day of July, 2005.

/s/
Marvin H. Shoob, Senior Judge
United State District Court
Northern District of Georgia

APPENDIX E

The First Amendment to the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST. amend. I.

APPENDIX F

Petitioner brought her individual claim against Respondent, the former Sheriff of Fulton County, Georgia, under 42 U.S.C. § 1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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No. 07-177

FILED
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SHIRLIE D. GREEN,
Petitioner,

v.

JACQUELYN H. BARRETT,
Sheriff, Fulton County, Georgia,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether certiorari should be granted on the issue of whether the Eleventh Circuit properly applied *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) to the underlying facts of this case when it granted qualified immunity to Sheriff Jacquelyn H. Barrett on Petitioner Shirlie D. Green's 42 U.S.C. § 1983 First Amendment claim?

II. Whether certiorari should be granted on the issue of whether the Eleventh Circuit's decision to grant Sheriff Jacquelyn H. Barrett qualified immunity on Petitioner Shirlie D. Green's 42 U.S.C. § 1983 First Amendment claim conflicts with a decision of another Court of Appeals on the same matter?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals of the Eleventh Circuit whose judgment is sought to be reviewed:

Jacquelyn H. Barrett,
Appellant Below.

Shirlie D. Green,
Appellee Below.

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IN THE

Supreme Court of the United States

No. 07-177

SHIRLIE D. GREEN,
Petitioner,

v.

JACQUELYN H. BARRETT,
Sheriff, Fulton County, Georgia,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

Petitioner Shirlie D. Green ("Green") presents no "compelling reason" for her petition for writ of certiorari ("Petition") to be granted, and therefore it should be denied. Green must show either that the Eleventh Circuit has entered a decision in conflict with the decision of another U.S. court of appeals on the same important matter, or that the Eleventh Circuit has departed from the accepted and usual course of judicial proceedings such that intervention by this Court is necessary. Green's Petition fails to meet this standard, and simply reargues her Eleventh Circuit presentation that "in-court testimonial speech" must be analyzed differently than other speech. The Eleventh Circuit correctly applied the rule of law set forth in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006),

and rejected this notion. The Eleventh Circuit, following *Garcetti*, held that Green's in-court testimony "was given pursuant to her official duties as Chief Jailer."

Green counters in her Petition that the Eleventh Circuit's decision below "improperly expanded this Court's holding in *Garcetti*" by applying it to her in-court testimony. However, Supreme Court precedent confirms that the testimonial nature of in-court speech is not the sole factor evaluated to determine whether First Amendment protection applies. Moreover, Green fails to identify precedent which explicitly grants in-court testimony some special status in First Amendment jurisprudence.

Green further contends that the Eleventh Circuit's decision is at odds with other courts of appeals because it did not determine that in-court testimony always is protected speech. This special status argument is a stretch, given that other circuits routinely have held that testimonial speech not given by a government employee in her role as a private citizen on a matter of public concern receives no special First Amendment protection. In sum, Green has not met her burden of demonstrating that there is a compelling reason for this Court to grant her Petition. Therefore, the Petition should be denied.

COUNTER STATEMENT OF THE CASE

Outside the context of law enforcement, local government employees rarely are called upon to provide in-court testimony as part of of their official duties. Green sued Sheriff Jacquelyn H. Barrett ("Barrett") pursuant to 42 U.S.C. § 1983 alleging that Barrett violated her First Amendment rights when Barrett terminated her after she testified in court that the Fulton County Jail ("Jail") was "unsafe." Indeed, Green's testimony proved to be imprudent in light of O.C.G.A. § 42-4-4(a)(3) which requires that if a jail is declared "unsafe," *all* prisoners must be removed from the jail by the Sheriff. *See* O.C.G.A. § 42-4-4. In this case, the Chief Jailer of the

Fulton County Jail declared it unsafe. Sheriff Barrett, the Chief Jailer's employer, disagreed.

As Sheriff, Barrett was charged with the responsibility of operating a safe jail and had the sole authority to hire and fire the Chief Jailer. (R1-76, Barrett Aff., ¶¶ 5, 6). The Chief Jailer is responsible for the day to day operations of the Jail. (R1-76, Barrett Aff., ¶ 6). In February, 2002, Barrett promoted Green to the position of Chief Jailer. (R1-76, Barrett Aff., ¶ 7). In the ten years prior to Green's promotion to Chief Jailer, there had been no successful inmate escapes from the Fulton County Jail. (R1-53, Barrett Dep. at 55-56). Shortly after Green became Chief Jailer, there were a number of successful inmate escapes. (R1-53, Barrett Dep. at 55-59, Ex. 41).

On March 20, 2003, under Green's watch, Jamil Abdullah Al-Amin, a notorious criminal, was being housed at the Jail following his conviction for murdering Fulton County Deputy Sheriff Ricky Kinchen. (R1-1, ¶ 15). Security cameras at the Jail captured Al-Amin walking freely about the Jail while at the same time other inmates attempted to escape. (R1-12, ¶¶ 16, 17). As a consequence of Al-Amin's celebrity, the attempted escapes and Al-Amin's designation as both a maximum security inmate and escape risk, Barrett petitioned the Fulton County Superior Court to remove Al-Amin from the Jail and place him into State custody. (R1-1, ¶ 19; R1-53, Barrett Dep. at 106-109; R1-76, Barrett Aff., ¶ 12).

Barrett selected Green to testify at the Superior Court hearing as Chief Jailer. (R1-76, Barrett Aff., ¶ 13). Barrett met with Green and the District Attorney assigned to this matter prior to Green giving testimony at the hearing. (R1-53, Barrett Dep. at 107-108). Barrett expressly articulated that the Fulton County Jail was not an appropriate facility to house someone as dangerous as Al-Amin. (R1-53, Barrett Dep. at 109). Barrett did not articulate that the Jail was unsafe, (nor would she), given the serious consequences im-

posed by such a declaration. Green, however, in response to a question posed by Al-Amin's defense attorney testified that the Jail was "unsafe." (R1-76, Al-Amin Hearing Transcript at 84-91; R1-53, Barrett Dep., Ex. 43).

The local media, recognizing the serious nature of the "unsafe" declaration, immediately printed Green's testimony that the Fulton County Jail was unsafe. (R1-53, Barrett Dep., Ex. 43). As a result, Barrett was called upon in the same article to declare the opposite: "Barrett contended that the jail *is safe* in that it has only had one successful escape in 10 years . . . until six months ago . . ." (R1-53, Barrett Dep., Ex. 43) (Emphasis added). Green also testified that there was a pervasive problem with the locks on cells. These revelations predictably caused great concern to Barrett since she was unaware that her Chief Jailer considered the Jail "unsafe." (R1-53, Barrett Dep. at 96-97; R1-76, Barrett Aff., ¶ 18).

Green's testimony convinced Barrett that Green was not competent to serve as Chief Jailer. (R1-76, Barrett Aff., ¶ 19). Even before the hearing, Barrett identified a number of performance issues related to Green—inmate escapes, maintenance failures, failure to follow policies related to linen exchange which allowed inmates to have access to the sheets used in the attempted escapes, inmate vandalism, cell doors taken off the hinges by inmates, and others. (R1-53, Barrett Dep. at 47-50, 52-56, 60-62, 65-69, 71-74, 75-79, 81-84, 119-120, 127-130 and 171; R1-76, excerpts attached as Exhibit "A" to Defendant's Statement of Material Facts as to Which There is No Genuine Issue to Be Tried).

As a result of Green's unexpected declaration that the Jail was "unsafe" and other performance related issues, Barrett terminated Green on March 27, 2003. (R1-53, Barrett Dep. at 70, 119 and 209; R1-76, Barrett Aff., ¶ 19). Green's termination "had nothing to do with her exercising her first amendment right." (R1-53, Barrett Dep. at 213; R1-76, Barrett Aff., ¶ 20). Barrett felt that declaring the Jail "unsafe" was a

mischaracterization of the Jail's true status. Barrett testified that "Ms. Green's testimony called into question her ability to keep the jail safe which was a primary component of her obligation as the chief jailer." (R1-76, Barrett's Responses to Interrogatories, ¶ 15, attached as Exhibit "B" to Barrett Aff.).

REASONS FOR DENYING THE PETITION

The Eleventh Circuit's decision below does not conflict with any decision of this Court or of any other Court of Appeals. Indeed, the Eleventh Circuit's decision properly applies *Garcetti* to grant Barrett qualified immunity. Moreover, Green seeks review of the Eleventh Circuit's application of a properly stated rule of law, *Garcetti*, which does not ordinarily constitute grounds for certiorari. Consequently, the Petition should be denied.

I. Certiorari Should Not Be Granted Because The Eleventh Circuit Properly Applied *Garcetti* To The Facts Of This Case And Properly Granted Qualified Immunity To Barrett.

Here, qualified immunity applies because it is undisputed that Barrett acted within her discretionary authority in firing Green. *See* Pet. App. 7a. In determining whether the properly asserted qualified immunity of a public official can be overcome, the initial inquiry is whether the facts relied upon show that the public official violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If no violation of a constitutional right is established, then the inquiry is at an end, and qualified immunity must be upheld. *Id.*

Among her claims, Green asserts that her First Amendment right to freedom of speech was violated when Barrett terminated her after she testified during a hearing that the Jail was "unsafe." Pet. at 6-8. At the time of her testimony, Green held the position of Chief Jailer. As Chief Jailer, it was Green's job to make sure the Jail was safe. To be

successful in a claim of public employer retaliation for protected speech under the First Amendment, the employee must present evidence which demonstrates the following: (1) the employee's speech is on a matter of public concern; (2) the employee's First Amendment interest in engaging in the speech outweighs the employer's interest in prohibiting the speech to promote the efficiency of the public services it performs through its employees; and (3) the employee's speech played a substantial or motivating role in the employer's decision to demote or discharge the employee. *See Akins v. Fulton County*, 420 F.3d 1293, 1303 (11th Cir. 2005), *cert. denied*, 546 U.S. 1095 (2006).

To demonstrate that Barrett violated a constitutional right, Green must first show that the speech which is alleged to have lead to the retaliatory conduct is protected by the First Amendment. Green cannot get past this hurdle. This Court has held that in order to receive protection, it must be fairly determined that the government employee spoke as a private citizen on a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146 (1983); *accord*, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). The Eleventh Circuit's application of *Garcetti* in this First Amendment retaliation case is supported in the law. Specifically, in *Garcetti*, this Court held that "when public employees make statements pursuant to their official duties, they are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline." 126 S. Ct. at 1960 (Emphasis in original). As a result, the threshold inquiry is whether the public employee's statements are made pursuant to her official duties.

Contrary to Green's assertion, the holding in *Garcetti* represents an adherence to the rule of law rather than an "improper expan[sion]." To insure the proper functioning of government, government employers must be able to exercise control over their employee's speech and conduct. *Garcetti*,

126 S. Ct. at 1958. In this case, the Eleventh Circuit properly applied the rule of law set forth in *Garcetti*. The Eleventh Circuit focused on whether Green testified as part of her duties as Chief Jailer. Pet. App. at 8a-9a. This Court consistently has recognized that a public employee's speech is not protected by the First Amendment unless the employee is speaking as *a private citizen* on a matter of public concern. Hence, the Eleventh Circuit's holding in this case is proper in light of Supreme Court precedent.

In determining that Green's testimony was given pursuant to her official duties, the Eleventh Circuit found that "Green [did not] dispute that she testified at the hearing because she was the Chief Jailer, the public employee responsible for the conditions at the [J]ail." Pet. App. at 8a. Further, the Eleventh Circuit found that Green did not "contend that the purpose of her statements was to communicate to the public her concerns about the general safety of the Fulton County Jail or the necessity for a change in conditions of the jail." Pet. App. at 8a. The Eleventh Circuit found that the evidence in the record established that the sole purpose of Green's testimony was to assess whether it was safe to house inmate Al-Amin at the Jail. Pet. App. at 8a-9a.

Since *Garcetti*, the Eleventh Circuit has reached similar conclusions in similar cases. In *Villa v. Padron*, 484 F.3d 1334 (11th Cir. 2007), the Eleventh Circuit held that the First Amendment was not violated where a public college employee sued because she was not retained after she criticized the allegedly illegal or unethical behavior of certain college officials, including the college president. Miami-Dade Community College employed Ms. Adis Villa ("Villa") as the Vice President of External Affairs where she supervised the college-wide units of grants, governmental affairs, and legal affairs among other duties. 484 F.3d at 1336. During the period of her employment, Villa complained verbally and in

writing to college officials of the illegal use of college funds and non-competitive contract bidding practices. Also, Villa complained to a former board member at the college. *Id.* at 1340.

While the Eleventh Circuit viewed Villa's communications with college officials to have occurred pursuant to her duties as a legal affairs officer, it undertook a separate analysis of her statements to the former board member. *Id.* With regard to these statements, Villa asserted that she was simply seeking guidance from the former board member. *Id.* Therefore, the Eleventh Circuit found that Villa's speech was unprotected because she was not speaking as a citizen on a matter of public concern. *Id.*

As Green here may not have had a specific written duty to testify in the Al-Amin hearing, Villa did not have a specific duty to seek the counsel of a former College Board member. However, the Eleventh Circuit recognized in both cases that the purpose of the speech was to aide the employee in the performance of her official duties. Ms. Villa acted in the best interests of Miami-Dade Community College when she sought advice regarding how she should proceed in unveiling corruption. Similarly, Green acted on behalf of the Sheriff's Department when she was selected by Barrett to testify about the danger of housing Al-Amin at the Jail. Thus, both parties acted pursuant to their official duties when they spoke. *See Gilder-Lucas v. Elmore County Bd. of Educ.*, 186 Fed. Appx. 885 (11th Cir. 2006) (finding that a high school teacher spoke pursuant to her official duties when she raised concerns about the fairness of cheerleader tryouts in response to an inquiry by the school principal); *Battle v. Bd. of Regents for the State of Georgia*, 468 F.3d 755, 761 (11th Cir. 2006) (affirming summary judgment on the basis of qualified immunity for defendants, in part because plaintiff spoke pursuant to her official duties, where her duties in the college office of financial affairs included verifying the accuracy of student

financial aide files and where she subsequently reported to the federal Department of Education suspected fraudulent activity in the procurement of student financial aid).

Much of the Petition argues that Green's speech is a protected form of speech under the First Amendment simply because it was testimonial in nature. However, Green can cite to no authority to support such a conclusion. It is well-settled that where a government employee alleges speech-related retaliatory action by a government employer, the relevant inquiry does not end at a determination that the speech has taken place in a particular forum. *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) ("In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose."). Consequently, the fact that Green made her statements during in-court testimony is but a factor in the proper analysis of this case.

II. Certiorari Should Not Be Granted Because The Eleventh Circuit's Decision Does Not Conflict With Other Courts Of Appeals Decisions On The Same Matter.

In her brief, Green cites to no authority that conflicts with the Eleventh Circuit's holding in this case. Green does not point to any decision of this Court or of any circuit holding that speech is automatically protected when a government employee alleges retaliation for statements made in court under oath. Since *Garcetti*, other circuits have considered employer retaliation claims under the First Amendment, and none of these decisions has turned on the fact that the employee was testifying at the time of the speech. More importantly, none of the circuits have interpreted *Garcetti's* holding as being limited to the specific facts presented in that case. Therefore, the Petition should be denied.

In *Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004), the Fourth Circuit held that the speech of a police officer testifying at a public hearing was not protected. In *Kirby*, the police officer brought a First Amendment claim against the defendant city and its police department because he was disciplined as a result of his testimony at a grievance hearing. *Id.* In determining that the police officer's speech was not on a matter of public concern, the Fourth Circuit rejected the notion that the testimonial nature of the speech had any import on its inquiry. *Id.* at 447.

The Court of Appeals for the District of Columbia Circuit applied *Garcetti* in analyzing a First Amendment retaliation claim based on an employee's oral accusations of workplace discrimination to her employer. *See Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir. 2007). In that case, the court held that summary judgment should be granted for the defendants because the employee was not speaking "as a citizen." *Id.* at 1149. In support of its conclusion, the court noted that "[u]ltimately, supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission[.]" *Id.* at 1150 (citing *Garcetti*, 126 S. Ct. at 1960 (quotations omitted).

No court of appeals has found that the holding in *Garcetti* is limited to written speech in the form of an internal memoranda. Since *Garcetti*, these courts uniformly have applied the *Garcetti* test of speaking as a private citizen to all manners of alleged speech. Therefore, Green cannot meet her burden of establishing a conflict between circuit court decisions with regard to the application of *Garcetti*, and her Petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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